88-150

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

MILDRED IRVIN, ET AL, Petitioners

VS.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Feres doctrine should be applied in an action brought by an active duty servicewoman's dependent for negligent prenatal care given to the servicewoman's dependent while in utero.

2. Whether the Feres doctrine should be applied in an action brought by former active duty personnel seeking damages for injuries to a dependent caused by negligent prenatal care.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No.

MILDRED IRVIN, ET AL., Petitioners

V.

UNITED STATES OF AMERICA, ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Mildred Irvin, Silas Irvin, and as next friends of Quintessa Irvin, the petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on April 27, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A. infra) is reported at 845 F. 2d 126. The opinion of the District Court (App. B. infra) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1988. The jurisdiction of the Supreme Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED

1. 28 U.S.C. Section 2674 provides:

   The United States shall be liable, respecting the provisions of this title relating to tort claims in the same manner and to the same extent as a private individual under like circumstances, bur shall not be liable for interest prior to judgment or for punitive damages.

   If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

2. 28 U.S.C. Section 2680(j) provides in pertinent part:

   The provisions of this chapter and section 1346 (b) of this title shall not apply to -

   (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

STATEMENT OF CASE

Decedent, Quintessa Irvin, was born August 26, 1984, and died on August 29, 1984, at the age of four (4) days. At the time of decedent's death, petitioner Mildred Irvin was enlisted in the United States Army. Mildred Irvin had become pregnant in early 1984 while on active duty in the United States Army. It is alleged that the death of Quintessa Irvin was caused by negligent medical care rendered to Mildred Irvin and Quintessa Irvin. An action was brought based on the Federal Tort Claims Act (FTCA) 28 U.S.C. Section 2674, in the United States District Court.

Respondent moved to dismiss stating that the case of Feres v. United States, 340 U.S. 135 (1950) precluded petitioners from bringing an action for medical malpractice. Respondents asserted that the wrong complained of arose out of or occurred incident to military service while decedent's mother was on active duty. The District Court granted respondents' Motion to Dismiss by Order dated May 5, 1987, ruling Feres bars the claims of the decedent.

On appeal, the Court of Appeals affirmed. 845 F. 2d 126 (6th Cir. 1988). The Court relied on the factually similar case of Scales v. United States, 685 F. 2d 970 (5th Cir. 1982). Where the Scales Court stated "[t]he treatment accorded his mother is inherently inseparable from the treatment accorded [the child] as a fetus in his mother's body." The Court of Appeals declined to adopt the approach of the Eleventh Circuit Court of Appeals which took a different position in a factually similar case. Del Rio v. United States, 833 F. 2d 282 (11th Cir. 1987).

REASONS FOR GRANTING WRIT

Consideration by this Court is necessary on the ground that the holding below conflicts directly with the decision of the Court of Appeals for the Eleventh Circuit in Del Rio v. United States, 833 F. 2d 282 (11th Cir. 1987) and conflicts substantively with the Court of Appeals for the Ninth Circuit in Atkinson v. United States, 804 F. 2d 561, opinion withdrawn, 825 F. 2d 202 (9th Cir. 1987), cert. denied, U.S. 108 S.Ct. 1288 (1988).

In Del Rio, the Court of Appeals stated that application of the three rationales of the Feres decision would not bar the claim by an infant dependent of a service person. 833 F. 2d at 287. The Court pointed out that "the child does not have 'distinctively federal' relationship with the government." Id. Second, the child is not entitled to any statutory benefits, and finally, "while a suit by [the child] may require the same type of inquiry into the physician's decisions as a suit by [the service person], military discipline is not implicated to the same degree. Id.

The Eleventh Circuit Court of Appeals allowed the dependent child to bring his claim because the Feres rationales

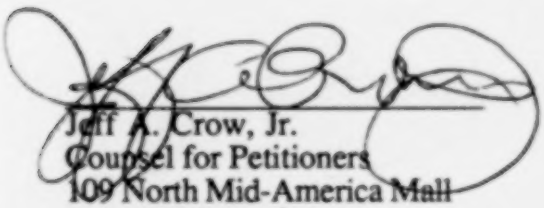
did not apply to him. However, the decision of the Court of Appeals in the present case failed to look at the rationale behind the Feres decision as this Court has pointed out needs to be done. By failing to apply the Feres rationale the Court of Appeals has decided a federal question that conflicts with United States v. Johnson, U.S. ,197 S.Ct. 2063 (1987).

In Johnson, this Court re-emphasized the three basic rationales of the Feres decision. The Court of Appeals in the present case has neglected to apply these rationales. By neglecting to apply the rationale, especially in a situation where the injured petitioner was not a military member, the Court of Appeals conflicted directly with Johnson. As a result of this conflict in the Circuits and as a result of this conflict in the Circuits and as a result of this conflict with a decision by this Court, this case warrants certiorari.

CONCLUSIONS

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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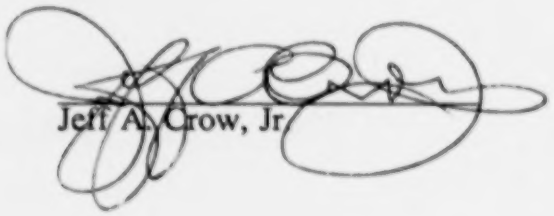
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to Mr. Robert M. Williams, Jr., Assistant United States Attorney, at Room 1026, 167 North Main Street, Memphis, TN 38103, by United States Mail, postage prepaid, this 25th day of July, 1988.



Jeff A. Crow, Jr.

No. 87-5630

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MILDRED IRVIN and SILAS IRVIN, individually and as parents and next friends of QUINTESSA IRVIN, deceased,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and THE DEPARTMENT OF THE ARMY,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed April 27, 1988

Before: JONES and GUY, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge. Mildred Irvin and Silas Irvin, individually and as parents and next friends of decedent Quintessa Irvin, appeal from the district court's order granting appellees' motion to dismiss. For the following reasons, we affirm the district court's judgment.

I.

Mildred Irvin became pregnant in early 1984 while on active duty in the United States Army. The United States

Army provided her prenatal care. Decedent Quintessa Irvin was born on August 26, 1984 and died on August 29, 1984, at the age of four days. At the time of Quintessa Irvin's death, Mildred Irvin was enlisted in the United States Army.

On July 25, 1986, appellants filed this action in district court against the United States and the Department of the Army jointly and severally. The complaint contains two counts. Count one is brought pursuant to the Federal Tort Claims Act (FTCA). Count two is brought pursuant to 42 U.S.C. § 1983.[1] Count one alleges that this cause of action arises out of negligent medical care and treatment rendered Mildred Irvin and the deceased Quintessa Irvin by the agents, servants and employees of the United States and the Department of the Army. Specifically, the complaint alleges that appellees were negligent in the following ways:

A. In prescribing contraindicated medication;

B. In failing to agreessively treat, evaluate and properly diagnose the pregnancy condition;

C. In classifying and treating Mildred Irvin as a

---

[1]Appellees have construed count two as a *Bivens* action, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), since section 1983 actions may be brought only against state actors and not the federal government. *See Hall v. United States*, 704 F.2d 246, 249 n.1 (6th Cir.), *cert. denied*, 464 U.S. 1002 (1983). The Supreme Court has held that no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to military service. *United States v. Stanley*, 107 S. Ct. 3054, 3063 (1987). The district court did not analyze count two separately or even acknowledge the constitutional claim but held only that *United States v. Feres*, 340 U.S. 135 (1950), barred the cause of action. This error on the district court's part is harmless since *Stanley* holds that abstention in *Bivens* actions must be as extensive as the exception to the FTCA established by *Feres* and *United States v. Johnson*, 107 S. Ct. 2063 (1987). In any event, appellants make no separate arguments with respect to count two on appeal.

routine patient despite her medical history and condition;

D. In failing to have Mildred Irvin examined and treated by qualified medical personnel;

E. In failing to reclassify Mildred Irvin's medical condition as urgent; and

F. In generally failing to adhere to recognized acceptable medical standards of care.

Count two alleges that appellees' actions constituted a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States in violation of section 1983.

On May 6, 1987, the district court filed an order which dismissed the case for lack of subject matter jurisdiction. The court reasoned that Mildred Irvin's claim falls squarely into the incident to service test as currently defined by this circuit. Further, the court reasoned that the " 'treatment accorded [the] mother is inherently inseparable from the treatment accorded . . . a fetus in [the] mother's body.' " *Irvin v. United States,* No. 86-2563-MA, Slip op. at 2 (W.D. Tenn. May 6, 1987) (quoting *Scales v. United States,* 685 F.2d 970, 974 (5th Cir. 1982), *cert. denied,* 460 U.S. 1082 (1983)). Thus, the district court held that the *Feres* doctrine bars both the claims of the parents and the child arising from the alleged negligent prenatal care Mildred Irvin suffered in a military hospital while she was on active duty.

Appellants filed this timely appeal on May 29, 1987. This court must decide whether the *Feres* doctrine, *United States v. Feres,* 340 U.S. 135 (1950), bars an action brought by a former active duty servicewoman for negligent prenatal care given during her enlistment. Additionally, we must decide whether the *Feres* doctrine bars an action brought by a former active duty servicewoman and her husband as parents and next friends of a deceased infant for negligent prenatal care

given to the servicewoman, to her deceased infant while *in utero,* or to both during the servicewoman's enlistment.

II.

In *Feres,* the Supreme Court held that the government is not liable under the FTCA for injuries to servicemen when the injuries arise out of or are in the course of activity incident to service. *United States v. Feres,* 340 U.S. 135, 146 (1950). The Supreme Court has recently reaffirmed the *Feres* doctrine in *United States v. Johnson,* 107 S. Ct. 2063 (1987). Although the specific question in *Johnson* concerned whether the *Feres* doctrine bars an action under the FTCA on behalf of a service member killed during the course of activity incident to service when the complaint alleges negligence on the part of civilian employees of the federal government, the Court reconsidered the *Feres* doctrine and the policy behind it at length.

In *Johnson,* the Court identified three factors which underlie the *Feres* doctrine:

> 'First, the relationship between the Government and members of its Armed Forced is " 'distinctively federal in character,' "; it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans' Benefits Act establishes as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor . . .[is] '[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent

> orders given or negligent acts committed in the course of military duty. . . .' '

Johnson, 107 S. Ct. at 2065 n.2 (quoting *Stencel v. Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-72 (1977)) (citations omitted). The Court "reaffirm[ed] the holding of *Feres* that 'the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.' " *Johnson*, 107 S. Ct. at 2069. In *Johnson*, the *Feres* doctrine barred the action despite the non-military status of the alleged tortfeasor.

Prior to *Johnson*, in *Stencel v. Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), the Supreme Court considered whether the United States is liable under the FTCA to indemnify a third party for damages paid by it to a member of the armed forces injured in the course of military service. In *Stencel*, a private military manufacturer-supplier and the United States had been sued for injuries sustained by a serviceman which arose out of or in the course of activity incident to service. The private military manufacturer-supplier cross-claimed against the United States for indemnity. The serviceman's suit against the United States had been dismissed pursuant to *Feres* and was not before the Court. The Court reviewed only the private military manufacturer-supplier's claim for indemnity.

The Court considered the three factors underlying the *Feres* doctrine when evaluating the claim. The Court reasoned as follows:

> Clearly, the first factor considered in *Feres* operates with equal force in this case. The relationship between the Government and its suppliers of ordnance is certainly no less 'distinctively federal in character' than the relationship between the Government and its soldiers. . . . If, as the Court held in *Feres*, it makes no sense to permit the fortuity

> of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries, it makes equally little sense to permit that situs to affect the Government's liability to a Government contractor for the identical injury.
>
> The second factor considered by *Feres* is somewhat more difficult to apply. . . .
>
> . . . [However, g]iven the broad exposure of the Government, and the great variability in the potentially applicable tort law, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries. To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. . . .
>
> Turning to the third factor, it seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions. This factor, too, weighs against permitting any recovery by petitioner against the United States.

Stencel, 431 U.S. at 672-73 (citations omitted).

With Supreme Court precedent in mind, we turn to a discussion of the specific issues involved in the instant case.

A.

Appellants rely heavily on the Ninth Circuit case of *Atkinson v. United States*, 804 F.2d 561, *opinion withdrawn*, 825 F.2d 202 (9th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3677 (U.S. Ap.4, 1988), to support Ms. Irvin's individual claim. In *Atkinson*, a woman who was serving in the United States Army during the course of her pregnancy and delivery sued the United States alleging that as the result of negligent medical treatment she delivered a stillborn child and suffered physical and emotional injuries of her own. 825 F.2d at 203. In its original opinion, the Ninth Circuit evaluated Atkinson's claim in light of only the third policy factor identified by *Feres*. The court held that the facts in that case, viewed in light of the *Feres* doctrine's underlying disciplinary rationale, lead to the conclusion that the FTCA permitted Atkinson's cause of action. 804 F.2d at 564-65. This is the opinion relied on by appellants.

The Ninth Circuit, however, has withdrawn its original opinion in *Atkinson*. In light of the Supreme Court's reaffirmance of all three factors in *Feres*, that court has held that Ms. Atkinson's claim was barred by the FTCA. 825 F.2d at 205-06. The court held that although it believed that the military discipline rationale did not support the application of the *Feres* doctrine in that case, the first two rationales support its application. *Id.* at 206.

Two additional circuits have also held that the servicewoman mother's claims were barred by the *Feres* doctrine in analogous prenatal care medical malpractice cases. The Fifth Circuit has adopted this position in *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). More recently, the Eleventh Circuit has taken this position in *Del Rio v. United States*, 833 F.2d 282 (11th Cir 1987). This is the position which we adopt today.

Ms. Irvin's individual claim is barred under a straightforward reading of *Feres*. Ms. Irvin was on active duty in the

United States Army during the time in question, and the injuries to her arose out of or were in the course of activity incident to service. For these reasons, her individual claim must fail.

B.

Appellants acknowledge that some circuits have construed *Feres* to bar claims of dependents of servicemen where the claim has its "genesis" in an injury to a serviceperson incident to military service. *See e.g., Lombard v. United States,* 690 F.2d 215, 226 (D.C. Cir. 1982), *cert. denied,* 462 U.S. 1118 (1983); *Mondelli v. United States,* 711 F.2d 567 (3d Cir. 1983), *cert. denied,* 465 U.S. 102 (1984); *Monaco v. United States,* 661 F.2d 129 (9th Cir. 1981), *cert. denied,* 456 U.S. 989 (1982). Appellants argue, however, that the genesis test ignores the basic rationale supporting the *Feres* decision. Thus, appellants would have us reject the genisis test adopted by other circuits in order to permit the claims on behalf of decedent Quintessa Irvin. We decline appellants' invitation to reject the genesis test.

The genesis test appears to have evolved from *Stencel. See e.g., Lombard,* 690 F.2d at 223-26; *Monaco,* 661 F.2d at 133. The cases which have applied the genesis test have recognized that *Stencel* is not completely analogous since *Stencel* dealt with a *derivative claim* while these cases have dealt with an independent claim but a *derivative injury.* They have, however, followed the analysis in *Stencel* nonetheless. For example, *Monaco* involved the claims of the daughter of a serviceman exposed to radiation. The Ninth Circuit reasoned as follows:

> Denise's case differs from *Stencel* in that she seeks relief for an injury to herself rather than indemnity for losses due to injury to her father, but this does not change the substantive analysis: the court still must examine the Government's activity in relation

> to military personnel on active duty. It is precisely this type of examination the *Feres* doctrine seeks to avoid. Courts have reflected this analysis in several cases rejecting the claims of non-military plaintiffs seeking recovery for independent injuries stemming from allegedly negligent acts against military personnel.

Monaco, 661 F.2d at 134.

Many other courts have also denied independent claims of family members when the genisis of the injury was an injury to an active duty service person. *See e.g., DeFont v. United States*, 453 F.2d 1239 (1st Cir.), *cert. denied*, 407 U.S. 910 (1972) (serviceman's wife's mental anguish; child's loss of companionship); *Harrison v. United States*, 479 F. Supp. 529 (D. Conn. 1979), *aff'd without opinion*, 622 F.2d 573 (2d Cir.), *cert. denied*, 449 U.S. 828 (1980) (serviceman's wife's loss of consortium); *Hinkie v. United States*, 715 F.2d 96 (3d Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) (widow's miscarriages and children's birth defects caused by husband/father's exposure to radiation); *Mondelli v. United States*, 711 F.2d 567 (3d Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984) (child's cancer caused by father's exposure to radiation); *West v. United States*, 744 F.2d 1317 (7th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985) (vacating opinion reported at 729 F.2d 1120 which had held that there was a cause of action for injuries suffered by children allegedly resulting from negligent typing of father's blood at the time of induction).

Additionally, in *Scales*, the Fifth Circuit held that the *Feres* doctrine barred an infant's claims in a situation similar to the instant case. The court noted:

> The treatment accorded his mother is inherently inseparable from the treatment accorded Charles as a fetus in his mother's body. Consequently, the district court's analysis is the same whether the suit is

> brought by Charles or Ms. Scales. In either instance, the judge is placed in the position of questioning the propriety of decisions or conduct of fellow members of the Armed Forces. This is precisely the type of examination that *Feres* seeks to avoid.

Scales, 685 F.2d at 974.

This is the position which we adopt today. We note that the Eleventh Circuit has taken a different approach in *Del Rio*. *Del Rio*, 833 F.2d at 286-88. In *Del Rio*, the court allowed an action for negligent prenatal care to be brought by a surviving infant simply because the infant would have had an independent claim against a civilian physician under state law. *Id.* at 286 & n.2. *Feres* expressly refused to hold that the government had waived immunity simply because a *civilian* doctor would be liable for medical malpractice in an analogous situation. *Feres*, 340 U.S. at 142. *Del Rio*, however, does not cite to any state, nor do we know of one, which has permitted surviving infants to sue the state militia for injuries resulting from negligent prenatal care received by their mothers while on active duty and incident to military service. Additionally, the cases cited in *Del Rio* for the proposition that the *Feres* doctrine does not bar claims of medical malpractice brought by dependents of service members, *Del Rio*, 833 F.2d at 286-87, are inapposite since they all involve independent injuries to the complainant dependents. Finally, we are persuaded that the genesis test is consistent with what this court has described as the Supreme Court's recent embarkment on a course dedicated to the broadening of the *Feres* doctrine. *See Major v. United States*, 835 F.2d 641, 644 (6th Cir. 1987) (per curiam), *petition for cert. filed*, 56 U.S.L.W. 3667 (U.S. Mar. 14, 1988) (No. 87-1541).

For the foregoing reasons, the district court's judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MILDRED IRVIN, et al.,

Plaintiff,

vs. No. 86-2563-MA

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

The plaintiffs, Mildred A. Irvin and Silas M. Irvin, on behalf of themselves as parents and next friends of Quintessa Irvin, have instituted this lawsuit against the United States as a result of alleged negligent medical care rendered to Mildred Irvin during the course of her pregnancy by United States soldiers. During the time of the alleged negligent medical care, both Mildred and Silas Irvin were members of the Armed Services.

The defendant United States of America is before the Court on a Motion to Dismiss alleging that the government has not waived its immunity from suit under the Federal Tort

Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Feres v. United States, 340 U.S. 135, 146 (1950).

For an activity to be considered "incident to service," there must be a proximate relationship between the soldier's activity and the degree to which the activity is divorced from or related to military service. Woodside v. United States, 606 F.2d 134,141 (6th Cir. 1979). As a general rule, an injury to a soldier while receiving treatment at a military hospital is deemed to be incident to military service. Id. at 142, but see Atkinson v. United States, 804 F. 2d 561 (9th Cir. 1986) (claim for allegedly negligent prenatal care suffered by a servicewoman at a military hospital not barred by Feres Doctrine).

Mildred Irvin falls squarely into the incident to service test as currently defined by the Sixth Circuit. She was receiving medical treatment, on a military post and subject to military discipline. Therefore, she has no claim for injuries arising out of the medical care she received during her pregnancy or the delivery of Quintessa Irvin.

The Irvins are also seeking recovery as parents and next friend for the injuries suffered by their deceased daughter, Quintessa. However, the "treatment accorded [the] mother is inherently inseparable from the treatment accorded...a fetus in [the] mother's body." Scales v. United States, 685 F. 2d 970, 974 (5th Cir. 1982). The Feres Doctrine bars both the claims of the parents and child arising from the alleged negligent prenatal medical care Mildred Irvin suffered in a military hospital while she was on active duty. Id.

Therefore, since the United States has not consented to be sued, this cause is dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

ENTER: This _____ day of May, 1987.

_____
ROBERT M. McRAE
SENIOR UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-150

In the Supreme Court of the United States

OCTOBER TERM, 1988

MILDRED IRVIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-150

MILDRED IRVIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the courts below erred in dismissing under *Feres* v. *United States*, 340 U.S. 135, 146 (1950), their claims based on the allegedly negligent prenatal care afforded petitioner Mildred Irvin while she was on active duty in the United States Army.

1. Petitioners Mildred and Silas Irvin are the parents of Quintessa Irvin, who died in August 1984, four days after her birth. At that time, both Mr. and Mrs. Irvin were on active duty in the Army. They brought this suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671-2680, contending that negligent prenatal medical treatment by the Army had led to Quintessa's premature birth and her death. Petitioners have not alleged that Quintessa was treated negligently following her birth. Pet. App. A2-A3.

The district court dismissed the complaint (Pet. App. B1-B3). The court first noted that, under *Feres*, the FTCA does not provide relief for injuries incurred incident to military service (*id.* at B2). Mildred Irvin's individual claim, the court then held, "falls squarely into the incident to service test" (*ibid.*) since *Feres* itself involved medical malpractice claims. The court further concluded that petitioners could not recover as parents and next friends for the *in utero* injuries suffered by Quintessa. The court agreed with the Fifth Circuit's conclusion in *Scales* v. *United States*, 685 F.2d 970, 974 (1982), cert. denied, 460 U.S. 1082 (1983), another case involving *in utero* injuries to the child of a servicewoman, that "the 'treatment accorded [the] mother is inherently inseparable from the treatment accorded . . . a fetus in [the] mother's body' " (*id.* at B3).

The court of appeals affirmed (Pet. App. A1-A10). With respect to Mildred Irvin's individual claim, the court noted that the Ninth Circuit had withdrawn its opinion in *Atkinson* v. *United States*, 804 F.2d 561 (1986), on which petitioners had relied, where the court found that a servicewoman could bring suit challenging medical treatment during pregnancy. Following this Court's decision in *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), which reaffirmed the rule of *Feres*, the Ninth Circuit held that such claims are barred by *Feres*. *Atkinson* v. *United States*, 825 F.2d 202, 206 (9th Cir. 1987), cert. denied, No. 87-781 (Apr. 4, 1988). The court below next noted that "[t]wo additional circuits have also held that the servicewoman mother's claims were barred by the *Feres* doctrine in analogous prenatal care medical malpractice cases." Pet. App. A7 (citing *Del Rio* v. *United States*, 833 F.2d 282, 286 (11th Cir. 1987), and *Scales*, 685 F.2d at 973). The court held that "Ms. Irvin's individual claim is barred

under a straightforward reading of *Feres*" since she "was on active duty in the United States Army during the time in question, and the injuries to her arose out of or were in the course of activity incident to service" (Pet. App. A7-A8).

The court also held that *Feres* barred petitioners' claims brought as Quintessa's parents and next friends. The court noted that the courts of appeals have generally concluded that *Feres* bars "claims of dependents of servicemen where the claim has its 'genesis' in an injury to a serviceperson incident to military service" (Pet. App. A8). The court adopted that test. Like the district court, it agreed with the Fifth Circuit's conclusion that injury to a fetus " 'is inherently inseparable from the treatment' " accorded the mother. *Id.* at A9 (quoting *Scales*, 685 F.2d at 974).

2. Petitioners contend (Pet. 9) that review is warranted because the decision below conflicts with the Ninth Circuit's decision in *Atkinson* and the Eleventh Circuit's decision in *Del Rio*. They also suggest (Pet. 10) that it is contrary to this Court's decision in *Johnson*. There is no merit to those contentions. The decision below is fully consistent with *Johnson*, and the Ninth Circuit's conflicting decision in *Atkinson* has been withdrawn. While the court below did approach the question presented differently than did the Eleventh Circuit in *Del Rio*, review is not warranted to resolve that disagreement.

a. The courts below were plainly correct in holding that Mrs. Irvin's individual medical malpractice claim is barred. In *Johnson*, the Court reaffirmed that "service members cannot bring tort suits against the Government for injuries that 'arise out of or are in the course of activity incident to service.' " Slip op. 4 (quoting *Feres*, 340 U.S. at 146). As the Court noted, "the *Feres* doctrine has been applied consistently to bar all suits on behalf of service

members against the Government based upon service-related injuries" and specifically "decline[d] to modify the doctrine at this late date" (slip op. 6-7). The three consolidated cases decided by this Court in *Feres* included two medical malpractice claims, and this Court held that such claims are barred. The Ninth Circuit's contrary decision in *Atkinson* (804 F.2d 561), on which petitioners rely, was withdrawn following this Court's decision in *Johnson* (825 F.2d at 206), so there is no conflict in the courts of appeals.

b. The courts below also correctly concluded that petitioners' claims brought as Quintessa's parents and next friends are barred. In determining whether an injury to a dependent of a servicemember arose "incident to service," the lower courts have generally applied what the court below termed the "genesis" test. That test originated in *Van Sickel* v. *United States*, 285 F.2d 87 (9th Cir. 1960), where the dependents of a serviceman who died following an operation at a military hospital sought recovery for wrongful death. The court of appeals held that the claim was barred by *Feres*, even though under state law the dependents had an independent cause of action that accrued upon the death of their husband and father, because "its genesis must go back to the in-service injury alleged to have been sustained by him due to the negligence of others in the armed services" (285 F.2d at 91).

Under the genesis test, claims on behalf of the dependents of service members are held not to be barred where the dependent was himself negligently treated by military medical personnel. See, *e.g.*, *Burgess* v. *United States*, 744 F.2d 771 (11th Cir. 1984) (serviceman's child received post-delivery injury at army hospital); *Portis* v. *United States*, 483 F.2d 670 (4th Cir. 1973) (malpractice suit by serviceman's child treated in a military hospital).

However, where the injury to a dependent derived from the treatment of a service member, as in *Van Sickel*, the lower courts have held that the claim is barred. Thus, claims for mental anguish and loss of companionship on behalf of dependents of service members consistently have been held to be barred where the injury or death of the service member was service-related. See, *e.g.*, *De Font* v. *United States*, 453 F.2d 1239 (1st Cir.), cert. denied, 407 U.S. 910 (1972) (barring serviceman's wife's claim for mental anguish and child's claim for loss of companionship); *Harrison* v. *United States*, 479 F. Supp. 529 (D. Conn. 1979), aff'd, 622 F.2d 573 (2d Cir.) (Table), cert. denied, 449 U.S. 828 (1980) (barring wife of serviceman's claim for loss of consortium). Similarly, a number of courts have held that claims based on physical injuries to dependents of military personnel caused by the exposure of their fathers to radiation while they served in the armed forces are barred by *Feres*. See, *e.g.*, *Mondelli* v. *United States*, 711 F.2d 567, 569 (3d Cir. 1983), cert. denied, 465 U.S. 1021 (1984) (child's cancer allegedly caused by service member father's exposure to radiation); *Monaco* v. *United States*, 661 F.2d 129, 133-134 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982) (child's genetic defects resulted from service member father's exposure to radiation).

The lines drawn by the lower courts through the genesis test sensibly apply the incident to service test of *Feres* to cases involving dependents. As this Court stated in *Johnson*, "a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission" (slip op. 9). It would plainly make no sense to bar a service member from bringing a negligence suit challenging a military decision that led to an injury, while at the same time permitting the service member's

dependent to bring suit challenging the same decision on the ground that it indirectly caused mental anguish or physical injury to the dependent.

Furthermore, the genesis test is a reasonable application of this Court's decision in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). In *Stencel Aero*, a military pilot, injured when his ejection system malfunctioned, sued the manufacturer, which in turn sued the United States. This Court held that the manufacturer's claim was barred because the underlying injury was suffered incident to military service. While, as the court below noted (Pet. App. A8), *Stencel Aero* involved a derivative claim rather than a derivative injury, that difference should lead to no different result. The fact that an injury was suffered incident to military service means that a trial arising out of that injury would "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions" (431 U.S. at 673), whether the suit was based on a derivative claim or a derivative injury.

As applied to the unusual factual situation presented here—negligent treatment of an active duty servicewoman that allegedly harmed her fetus, with no claim that the child suffered any post-delivery injury—the genesis test reasonably leads to the result reached by the courts below and the Fifth Circuit in *Scales*. Under *Feres*, as we have shown, a servicewoman is plainly barred from suing on the basis of any injury to herself resulting from malpractice. Since any injury to the fetus necessarily resulted from the treatment of the mother, it is, as the courts below stated, " 'inherently inseparable from the treatment' " of the servicewoman. Pet. App. Ap, B3 (quoting *Scales*, 685 F.2d at 974). Moreover, as the court below stated, whether the

claim was brought on behalf of the mother or the child, " 'the judge is placed in the position of questioning the propriety of decisions or conduct of fellow members of the Armed Forces,' " which " 'is precisely the type of examination that *Feres* seeks to avoid.' " Pet. App. A10 (quoting *Scales*, 685 F.2d at 974).

c. The Eleventh Circuit followed a different approach in *Del Rio*, which also arose out of allegedly negligent prenatal care of a servicewoman. The court did not apply the "incident to service" test of *Feres* and the "genesis" test familiar in cases involving dependents, but instead analyzed the claim in light of the various rationales underlying the rule. It concluded that the servicewoman could not bring a claim on her own behalf (833 F.2d at 286) or a wrongful death claim on behalf of her twin child who died five days after birth (*id.* at 288), but could bring suit on behalf of the twin child who lived but was injured as a result of the allegedly negligent prenatal treatment (*id.* at 287).

Review is not warranted on account of the disagreement in approach between the decision below and the decision in *Del Rio*. As an initial matter, there is no disagreement in result since, in both cases, claims by a servicewoman on her own behalf and on behalf of a child who died as a result of allegedly negligent prenatal care were held to be barred. While, contrary to the Eleventh Circuit's decision, application of the genesis test would lead to the result that a claim may not be brought on behalf of a child injured as a result of negligent prenatal care who survives, that issue is not presented here. Moreover, the approach in *Del Rio* was plainly wrong. The rationales underlying the rules of *Feres* are not factors in a test to be applied on a case-by-case basis to determine whether a claim is barred, yet that is how the Eleventh Circuit analyzed the case. In its decision in *Johnson* v. *United States*, 749 F.2d 1530 (1985),

reinstated, 779 F.2d 1492 (1986) (en banc), the Eleventh Circuit also adopted a case-by-case approach to determine whether the suit at issue would tend to undermine military discipline and effectiveness (749 F.2d at 1537), the primary rationale underlying the rule. This Court reversed, reiterating that the test is whether the injury was suffered incident to military service (slip op. 4). See also *United States* v. *Stanley*, No. 86-393 (June 25, 1987), slip op. 11. That test was properly applied by the courts below, so review by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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